

Administrative Action

The Requirement for Administrative Action

Background

- 5.1 Although not formally a measure under the DFDA, administrative action provides the ADF with an alternative avenue to institute punitive measures against individuals. Such action can range from removal of a security clearance to discharge from the service.¹ The Committee noted that administrative action against a member can have a serious impact on his or her future career prospects within the ADF. Indeed, in cases of professional failure, administrative action may include discharge from the Service. The Committee was of the view that the punitive capacity of administrative action warranted an examination of the reasons for the ADF using administrative action in lieu of disciplinary action.
- 5.2 The Committee noted that administrative action may also ‘follow a civil conviction or formal disciplinary proceedings’.² This is not a case of double jeopardy but rather administrative follow up. For example, in the case of an individual convicted of fraud such administrative action may involve the change of a member’s employment category,³ removal of the member from his or her current position, a decision not to promote or to defer consideration for promotion or perhaps even to effect the termination of the member’s service. In most cases a criminal or DFDA

1 See Chapter 2 of this report.

2 Department of Defence, Submission, p. 1036.

3 For example: it may be inappropriate for a member convicted of fraud to continue to be employed as a military policeman.

conviction will not in itself result in the termination of a member's service, rather it can only be used as part of an administrative procedure to terminate an individual's service.⁴

Professional Failure

- 5.3 The ADF maintains that 'the use of administrative action is not generally an alternative to disciplinary or criminal action, except in some matters involving professional failure.'⁵ The Committee understood that the term *professional failure* as used by the ADF encompassed professional negligence and errors of judgement. In his 1995 Report to the Minister, the JAG addressed the methods of dealing with cases of professional error and suggested that trial by court martial, with its overtones of criminality,⁶ is not the most appropriate means.⁷
- 5.4 The Committee noted one submission that proposed that administrative action should only be taken to address administrative problems and not used in lieu of disciplinary action under the DFDA.⁸ However, when disciplinary action is proposed, regardless of whether it is under the DFDA, criminal or civil law, the evidentiary requirements to progress charges are such that the evidence must be of sufficient substance to comply with the rules of evidence, and the case must be provable beyond reasonable doubt. The ADF suggest that in some cases 'the weight and probity of evidence may fall short of that required to pursue disciplinary or criminal proceedings.'⁹
- 5.5 In such cases the commander may choose to pursue administrative action. One submission proposed that where this occurs the member subject to administrative action should be allowed to request that the matter be dealt with under the DFDA,¹⁰ with the far greater commensurate safeguards involved for all concerned.¹¹ The Committee noted that a commander can

4 Ms J Kelly, Transcript, p. 68.

5 Department of Defence, Submission, p. 1038.

6 Judge Advocate General, DFDA 1982, Report for the Period 1 January to 31 December 1995, p. 5.

7 The JAG went on to suggest that consideration be given to 'the establishment of a professional tribunal, for the profession of arms, in cases where competence is the question.' The proposed tribunal would not prohibit the option of trial by court martial but would offer an alternative. The proposed tribunal, comprising professional peers or superiors, would have the power to 'suspend an officer from the practice of his or her specialisation in appropriate cases.'

8 Lieutenant Colonel N James, Transcript, p. 104.

9 Department of Defence, Submission, p. 1036.

10 Individuals do not have the right to elect to be dealt with under the DFDA rather than be subject to administrative action.

11 Lieutenant Colonel N James, Submission, p. 682.

take administrative action against a member when there is no disciplinary case to answer, however, it acknowledged that the DFDA was framed to deal with breaches of discipline not matters of professional failure.

- 5.6 The Service Chiefs considered the methods available for dealing with professional failure in November 1997 and agreed ‘that the Services consider using the administrative rather than the disciplinary process for professional failure and that this initiative be standardised, where practicable, across the’ three Services.¹² Indeed, it was suggested in evidence presented to the Committee that ‘if the avenue of administrative action is followed for issues of professional negligence then people are generally held to account - normally via censure.’¹³ For errors of judgement that do not constitute professional negligence or involve an offence,¹⁴ administrative action provides a commander with a **formal** means of dealing with the matter. Moreover, the formality of the system brings with it certain safeguards in regard to natural justice and procedural fairness that may not be present in less formal arrangements.¹⁵
- 5.7 The ADF maintain that the course of action to be taken in dealing with a matter involving professional failure ‘is a command decision, to be taken on the basis of all of the available information,¹⁶ especially legal advice as to whether charges should be laid.’¹⁷ The system of administrative action employed within the ADF, has applicability across the ‘whole of the rank structures of the ADF’,¹⁸ and provides a means to deal formally with professional failure which does not involve ‘criminal conduct nor warrant the initiation of disciplinary proceedings.’¹⁹ Furthermore, it was argued that the ‘system of administrative action within the ADF²⁰ is designed to be fair and to ensure that there exists every opportunity for a member to make representation and to be heard; and ultimately there are rights of appeal.’²¹
- 5.8 In its first submission to this inquiry the ADF advised that although no hard and fast rules applicable to all circumstances can be established,

12 Department of Defence, Submission, p. 576.

13 Vice Admiral D Chalmers, Transcript, p. 44.

14 Either criminal, civil or DFDA.

15 Department of Defence, Submission, p. 1037.

16 In taking such a decision the commander must also consider the impact on the individual and the impact on the organisation.

17 Department of Defence, Submission, p. 1038.

18 *ibid.*

19 *ibid.*

20 See Chapter 2 of this report.

21 Admiral C Barrie, Transcript, p. 395.

guidelines covering the use of administrative action in cases of professional failure are appropriate and will be produced and issued.²²

Conclusions

- 5.9 The Committee accepted that where behaviour, actions or performance ‘fall short of the high standards of professionalism required in the ADF’²³ a commander needs the wherewithal to take action to prevent a recurrence. The Committee acknowledged that the DFDA was framed to deal with breaches of discipline and that administrative action provides a suitable avenue for a commander to deal with matters of professional failure. Moreover, the formality of the system allows certain safeguards ‘to ensure that the procedural fairness provisions of administrative law are met.’²⁴ The Committee concluded that any decision to allow members the option to elect to be dealt with under the DFDA rather than be subject to administrative action would require significant changes to the Act. The Committee agreed with the JAG²⁵ that trial by court martial, with its overtones of criminality is not the most appropriate means of dealing with matters of professional failure.
- 5.10 However, while the Committee accepted that the introduction of guidelines for dealing with professional failure was a positive action, it was unequivocal that where professional failure involved negligence of a criminal nature, subject to the weight and probity of evidence being sufficient, criminal proceedings should be instituted.

Recommendation 53

The Committee recommends that where professional failure involves negligence of a criminal nature, subject to the weight and probity of evidence being sufficient, criminal proceedings should be instituted.

22 Department of Defence, Submission, p. 576.

23 *ibid*, p. 1038.

24 Department of Defence, Submission, p. 1037.

25 1995 Report to the Minister.

Recommendation 54

The Committee recommends that the ADF prepare and issue guidelines regarding the use of the administrative action rather than the disciplinary process for cases of professional failure.

Procedure**Evidence**

- 5.11 The use of unsworn evidence in the administrative action process was raised as a procedural aspect needing attention. Indeed, one submission suggested that administrative action should not be progressed on the basis of unsworn evidence.²⁶ Rather, that if evidence were taken on oath and signed by the witness it would force witnesses to tell the truth and may allow such statements to be used in subsequent DFDA, civil or criminal proceedings.
- 5.12 This issue was considered, in relation to the conduct of military inquiries, earlier in this report²⁷ and the Committee accepted that some evidence presented did suggest that false accusations and misleading statements had been tendered in specific cases. However, the Committee did not believe that the taking of statements under oath would markedly change this. Moreover, any person who wilfully gives false evidence to a military inquiry is subject to prosecution for an offence under D(I)R. In such circumstances the false evidence given to the inquiry may be tendered as evidence in the prosecution under D(I)R. The Committee could not envisage any situation where administrative action would be taken on the basis of witness statements without either a D(I)R or DFDA investigation being conducted first. Therefore, the Committee did not see the need for statements used as a basis for administrative action to be made on oath.

Administrative Action as a Private Matter

- 5.13 One issue noted by the Committee in the evidence was the ADF approach of taking administrative action in private. In most cases, the administrative action process is conducted as a private matter between the commander and the subordinate in order to reduce the undermining effect

²⁶ Lieutenant Colonel N James, Submission, p. 682.

²⁷ See paragraphs 3.44 and 3.46 of this report.

on the subordinate's credibility that may result from more public action. The difficulty with the private approach is that individuals are sometimes perceived to have avoided the consequences of professional failure and this engenders suspicions of special treatment, or protection of members who may be perceived by the wider community as bearing some responsibility for an incident.

- 5.14 However, administrative action may be taken for reasons not confined to a particular, well publicised, incident. Furthermore, 'since there has been no criminal or disciplinary offence, there is no genuine public interest, even if there may be vicarious interest by the media in the outcomes.'²⁸ The ADF suggests that members have a right for these matters to be considered in a private and sensitive manner.²⁹ The Committee acknowledged the need for fairness to individuals and agreed that in the majority of cases, there is little to be gained by conducting administrative action as a public matter.³⁰

Administration to Discharge Unsuitable Personnel

- 5.15 For certain offences under the Defence Force Discipline Act, a service Tribunal may sentence a member to dismissal from the Defence Force.³¹ The ADF also have the authority to take administrative action to terminate the service of a member where:
- the officer has been absent without leave for a continuous period of at least three months;
 - retention is not in the interests of the ADF (after conviction of an offence or a service offence³² or as a result of unacceptable behaviour);
 - the member is inefficient or incompetent for reasons or causes within the member's control;
 - the member is unsuitable for further service (generally on psychological or medical grounds);³³ and

28 Department of Defence, Submission, p. 1037.

29 *ibid.*

30 The exception to this approach should be administrative action taken as a result of the findings and recommendation of a BOI.

31 DFDA, Section 68 (1) (c).

32 Having been convicted of an offence or a service offence, the Service Chief has certified in writing that, having regard to the nature and seriousness of the offence, the retention of the member is not in the interests of the Defence Force.

33 Defence Instruction (General) Personnel 03-3; Australian Book of Reference 10, Sailor's Career Management Manual, Chapter 6; Defence Instruction (Army) Personnel 47-10; Defence Instruction (Army) Personnel 116-5; Defence Instruction (Air Force) Personnel 4-19.

- behaviour, actions or performance ‘fall short of the high standards of professionalism required in the ADF’.³⁴
- 5.16 The ADF has formal administrative processes aimed at identifying personnel who are unsuitable for further military service. Initial identification of such individuals is often achieved through the annual confidential reporting system where the individual’s superiors are required to remark on performance, potential and attitudes. Individuals whose professional performance is considered to be unsatisfactory are provided with a progression of formal warnings, counselling and the opportunity to improve their level of performance.³⁵ When an individual fails to demonstrate an acceptable level of improvement the decision may be taken to terminate their service in the ADF.
- 5.17 There is a considerable amount of policy guidance provided on the termination³⁶ of service using administrative action within the ADF however, considerable differences exist between the three Services.³⁷ Although the procedural arrangements vary between the Services, when the decision is taken to pursue termination of the member’s service, the process that is followed is essentially the same. The member is provided with advice that termination is to be pursued and invited to demonstrate why the proposed action should not proceed. Such advice will outline the proposed action, the detailed basis upon which action is to be taken and the material relied upon by the decision-maker.³⁸
- 5.18 The member’s response is considered by the initiating officer in determining whether to proceed with the proposed termination. Both the initiating officer and the member have access to legal advice during the process. Following receipt of the member’s response to the termination advice the initiating officer either ceases termination action or recommends termination to the decision-maker. If, following

34 Department of Defence, Submission, p. 1038.

35 *ibid*, p. 1037.

36 Note that the correct terminology is for the appointment of an officer to be terminated while an Other Rank is discharged. Throughout this report the term ‘terminate’ is used for all members regardless of rank.

37 Defence Instruction (General) Personnel 03-3 outlines the policy for the termination of appointment of officers of the ADF. Procedures for the termination of a sailor’s service are covered in the Australian Book of Reference 10, Sailor’s Career Management Manual, Chapter 6. Some additional and specific procedures for the termination of an Army officer’s appointment are detailed in Defence Instruction (Army) Personnel 47-10 while those for soldiers are addressed in Defence Instruction (Army) Personnel 116-5. The policy and procedures governing administrative action against all Air Force personnel is contained in Defence Instruction (Air Force) Personnel 4-19.

38 Department of Defence, Submission, p. 1225.

consideration of the member's response, the initiating officer elects to progress termination action, the member's response, the initial advice that termination was to be pursued and the recommendations of the initiating officer are considered by the decision-maker in determining whether to proceed with the proposed termination.

- 5.19 For officers, the initiating officer is the relevant authority identified in legislation for the termination of the appointment of an officer. The relevant authorities are: the Governor General for officers of the rank of Major General (Equivalent) or a higher rank; the Minister of Defence Science and Personnel for officers of the rank of Brigadier (Equivalent) or a higher rank; and the single Service Chief for all other officers.³⁹ In the case of Warrant Officers, Non Commissioned Officers and Other Ranks the initiating officer is normally the member's commanding officer.⁴⁰
- 5.20 The Committee noted that, in most cases where termination of service is proposed for an officer, the initiating officer is also responsible for the final decision. The Committee was concerned that in such cases no separation existed between the initiating officer and the decision-maker. The Committee further noted that for Warrant Officers, Non Commissioned Officers and Other Ranks, the decision maker is generally a designated senior appointment holder.⁴¹ The Committee acknowledged that other than for a termination initiated by single Service headquarters or career management agencies this process provided for a separation between the initiating officer and the decision-maker.
- 5.21 Throughout the process a member is afforded every opportunity to make representation and to be heard. In addition, a member may appeal the decision to terminate⁴² through the internal ADF redress of grievance⁴³ system,⁴⁴ or through external agencies, such as the Defence Force

39 Defence Instruction (General) Personnel 03-3, p. 3. Note that the exception is in cases where an officer has been absent without leave for a continuous period of at least three months the relevant authorities are: the Minister of Defence Science and Personnel for officers of the rank of Brigadier (Equivalent) or a higher rank; and the single Service Chief for all other officers.

40 Provisions do exist in the relevant instructions for single Service headquarters or career management agencies to initiate the termination of Warrant Officers, Non Commissioned Officers and Other Ranks.

41 Defence Instruction (General) Personnel 03-3; Australian Book of Reference 10, Sailor's Career Management Manual, Chapter 6; Defence Instruction (Army) Personnel 47-10; Defence Instruction (Army) Personnel 116-5; Defence Instruction (Air Force) Personnel 4-19.

42 Admiral C Barrie, Transcript, p. 395.

43 When a member submits a Redress of Grievance in respect of proposed administrative action, the implementation of the proposed administrative action is suspended pending the outcome of the Redress of Grievance.

44 Defence Instruction (General) Personnel 34-1.

Ombudsman,⁴⁵ the Human Rights and Equal Opportunities Commissioner, and the civil courts.⁴⁶ Indeed, some cases before the Committee showed that, where an individual chooses to contest a decision to terminate his or her service, the avenues of redress and appeal are powerful enough to delay termination action for significant periods,⁴⁷ and where justification exists, to overturn a decision to terminate.

- 5.22 The Committee received no compelling evidence to suggest that an individual's service had been wrongfully terminated although some evidence presented to the Committee alleged that administrative action has been misused to effect the termination of military personnel on grounds of professional failure⁴⁸ or unsuitability for further military service.⁴⁹
- 5.23 The Committee noted that collusion between the initiating officer, and the decision-maker would be required to improperly effect the termination of a member's service with the ADF. The Committee acknowledged that where the initiating officer, and the decision-maker are different authorities, improper action would require collusion between the two authorities. The Committee conceded that while such collusion is possible, the organisational separation⁵⁰ between the initiating officer and the decision-maker suggest that such action is unlikely. However, the Committee was of the view that current arrangements provide significant scope, particularly in the termination of officers, for responsibility to initiate the action and act as the decision-maker to be vested in the same authority.
- 5.24 The Committee accepted that vindictive or improper action against an individual would be unlikely to survive all processes of review and avenues of appeal inherent in the current system. Indeed, the Committee considered that the review and appeal provisions in place to protect ADF members from unfair dismissal were comprehensive. Nonetheless, the Committee was of the view that the process rather than the review and appeal provisions should provide inherent safeguards against the improper termination of a member's service with the ADF. The Committee concluded that the ADF should review current procedural arrangements to ensure organisational separation between the initiating

45 Defence Instruction (General) Personnel 34-3.

46 Department of Defence, Submission, p. 1037.

47 In some cases greater than 12 months.

48 Continued performance below the minimal acceptable standard.

49 Including individuals whose attitudes or mental health make them unsuitable for further service in the ADF.

50 Separation by chain of command, rank and function.

officer and the decision-maker for all administrative action involving the termination of a member's service.

Recommendation 55

The Committee recommends that the ADF review current procedural arrangements to ensure organisational separation between the initiating officer and the decision-maker for all administrative action involving the termination of a member's service with the ADF.

Other Administrative Action

- 5.25 With the exception of administrative censure all other forms of administrative action follow a similar process to that used to administratively terminate the service of a member. The member is provided with advice of the administrative action⁵¹ to be pursued and invited to demonstrate why the proposed action should not proceed.⁵² The member's response is considered by the initiating officer in determining whether to proceed with the proposed termination. Both the initiating officer and the member have access to legal advice during the process. Following receipt of the member's response the initiating officer either ceases the proposed administrative action or recommends to the decision-maker that the action proceed. The initiating officer does not have the authority to make the final decision, rather the decision-maker provides a formal review of the proposed action before making a determination to proceed or not.
- 5.26 The Committee identified no significant weakness in the processes used to manage other administrative action.⁵³ The Committee accepted that the procedures in place provided for a separation of the roles of initiating officer and decision-maker and these arrangements afforded an adequate safeguard to protect individuals from misuse of the administrative action process. However, the Committee did note that current policy does not require the individual affected by censure action to be advised of his or her rights of appeal.

51 *Notice to Show Cause* is the term used by the Army. Within Navy the *Notice to Show Cause* is known as a *Notice of Cause* and within Air Force a *Formal Warning Letter*.

52 Such advice will outline the proposed action, the detailed basis upon which action is to be taken and the material relied upon by the decision maker.

53 Administrative action other than that associated with censure or discharge of unsuitable personnel from the ADF.

Administrative Censure

- 5.27 The procedures for administrative censure are different for all three Services. Procedures for administrative censure within Navy and Army are only applicable to officers while Air Force has a formal warning process that is applicable to all members of the Service.

Navy

- 5.28 The policy for administrative censure for officers within Navy is detailed in Defence Instruction (Navy) Administration 35-1. Navy consider an administrative censure to be 'a written record of the fact that an officer's conduct has fallen short of that to be expected of an officer of his/her seniority and experience... It is not a punishment and does not bar the subsequent trial by a Service Tribunal of an officer for an offence which is the same as, or substantially the same as, that for which he/she is censured.'⁵⁴ Such a censure can take two forms: a Commanding Officer's Logging or, in more serious circumstances, a censure by an Administrative Authority or the Chief of Navy.
- 5.29 A Commanding Officer's Logging is an internal-to-ship action that provides a formal admonishment of an officer.⁵⁵ The Logging is prepared in triplicate with a copy provided to the officer and the remaining two copies retained by the Commanding Officer. The Logging remains 'in the ship except when the officer is brought to trial by a Service Tribunal for a similar offence while he/she is still serving in the same ship, in which case the original copy [of the Logging] is made available for production at the trial.'⁵⁶ Both copies of the Logging retained by the Commanding Officer are destroyed when the officer leaves the ship. The policy⁵⁷ does not provide for the officer who is the subject of Logging action to be provided with advice of the proposed Logging⁵⁸ to be pursued and invited to demonstrate why the intended action should not proceed.⁵⁹ Nor is there provision for the officer's response to be considered by the Commanding Officer in determining whether to proceed with the proposed Logging.

54 Defence Instruction (Navy) Administration 35-1, p 1.

55 *ibid.*

56 *ibid.*

57 Defence Instruction (Navy) Administration 35-1.

58 Including the proposed action, the detailed basis upon which action is to be taken and the material to be relied upon by the decision maker.

59 Such advice will outline the proposed action, the detailed basis upon which action is to be taken and the material relied upon by the decision maker.

- 5.30 The procedure for a censure by an Administrative Authority or the Chief of Navy is somewhat different and is more closely aligned with that followed for other forms of administrative action. The Commanding Officer is required to forward a detailed report of the circumstances to the Administrative Authority.⁶⁰ The policy requires that in the preparation of this report the officer 'be given the opportunity to submit his/her reasons in writing as to why he/she should not be censured.'⁶¹ These reasons are to accompany the report to the Administrative Authority. The Administrative Authority may then 'refuse the submission [by the Commanding Officer], impose a censure or forward the [submission] to the Chief of Navy with his/her recommendations.'⁶² When a censure is imposed by an Administrative Authority or the Chief of Navy one copy is provided to the censured officer and a further copy is retained permanently on the officer's Navy Office personnel record. A copy of the officer's reasons as to why the censure should not be effected is attached to both copies of the censure. When a censure is initiated by an Administrative Authority or the Chief of Navy the officer who is the subject of the censure will be given a similar opportunity to present reasons as to why the censure should not be effected.
- 5.31 The effect of a censure within Navy 'on an officer's future employment and promotion will depend entirely on the circumstances.'⁶³ A Commanding Officer's Logging has a limited life⁶⁴ and is likely to only have an impact should the officer come before a Service Tribunal or repeat the conduct or behaviour which was the subject of the Logging. A censure by an Administrative Authority or the Chief of Navy has the potential for a more significant impact on an officer's future employment and promotion. It provides a permanent record and will be considered when selecting the officer for future postings and may 'indicate unsuitability for certain postings.'⁶⁵ The policy is clear that 'a censure does not in itself have the effect of precluding an officer from being considered for promotion' however the censure 'will be taken into account by the Promotion Board with all the other attributes of the officer.'⁶⁶

60 There are currently three Administrative Authorities in the RAN. They are the Chief of Navy, the Maritime Commander and the Naval Training Commander (See Department of Defence, Submission, p. 1286).

61 Defence Instruction (Navy) Administration 35-1, p. 2.

62 *ibid.*

63 *ibid.*

64 The officer's tenure in the ship.

65 Defence Instruction (Navy) Administration 35-1, p. 2.

66 *ibid.*

- 5.32 The Committee acknowledged that while there is no review of a Commanding Officer's Logging such administrative action is likely to have limited impact on an officer's future employment and promotion. Where the impact on an officer's future employment and promotion is potentially large, as is the case when a censure is imposed by an Administrative Authority or the Chief of Navy, the decision-maker is quite separate from the initiating officer. The Committee accepted that these arrangements provided adequate safeguards to protect individuals from misuse of the administrative censure process although a separation of the dual roles of initiating officer and decision-maker would improve current arrangements. The Committee noted that, as for other forms of administrative action, the individual is provided with significant avenues of appeal through the internal ADF redress of grievance⁶⁷ system,⁶⁸ or through external agencies, such as the Defence Force Ombudsman,⁶⁹ the Human Rights and Equal Opportunities Commissioner, and the civil courts. However, the Committee also noted that current policy does not require the individual affected by censure action to be advised of his or her rights of appeal.

Army

- 5.33 The policy for administrative censure for officers within Army is detailed in a draft Defence Instruction (Army) Personnel. Army consider an administrative censure to be 'a formal and adverse criticism of the behaviour or performance of an officer' however, a censure 'is not a punishment, or a Warning, but an administrative procedure whereby a superior military authority informs an officer of the authority's displeasure at the officer's work performance or manner of behaviour.'⁷⁰ The draft policy states that administrative censure is 'a matter of custom, rather than a prescribed procedure arising from a statute.'⁷¹ While the draft policy limits the appointment holders which can issue a censure, in practice administrative censures are also issued by Commanding Officers of the rank of Lieutenant Colonel.

67 When a members submits a Redress of Grievance in respect of proposed administrative action, the implementation of the proposed administrative action is suspended pending the outcome of the Redress of Grievance.

68 Defence Instruction (General) Personnel 34-1.

69 Defence Instruction (General) Personnel 34-3.

70 Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 1.

71 *ibid.*

- 5.34 When the decision is taken by an issuing authority⁷² to pursue administrative censure of an officer, that officer is provided with written advice of the proposed censure action and invited to demonstrate why the proposed action should not proceed. This advice is known as a *Notice to Show Cause*. The *Notice to Show Cause* will specify the precise nature of the proposed censure, the detailed basis upon which action is to be taken and the material upon which decision will be based. The officer's response to the *Notice to Show Cause* is considered by the issuing authority in making the decision to proceed or not to proceed with the proposed censure action. The censure process is generally conducted as a private matter between the issuing authority and the officer in order to reduce the undermining effect on the subordinate's credibility that may result from more public action.⁷³ Notwithstanding, both the issuing authority and the officer have access to legal advice during the process.
- 5.35 A censure within Army is imposed for a specified period.⁷⁴ The censure is prepared in triplicate with one copy provided to the censured officer, one copy placed on the officer's unit personnel file and the third copy forwarded to the Directorate of Officer Career Management – Army, for incorporation on the officer's career management personnel file. The policy does not require that a copy of the officer's response to the *Notice to Show Cause* be attached to copies of the censure placed on the officer's personnel files. When the life of the censure has expired copies of the censure are expunged from the officer's personnel files and destroyed.
- 5.36 The draft policy covering administrative censure within Army does not provide for any separation between the initiating officer and the decision-maker; indeed the issuing authority functions in both roles. Army contends that administrative action to censure an officer is a command decision and hence there is no requirement for separation of the roles of the initiating officer and the decision-maker. However, as for other forms of administrative action, the individual is provided with significant avenues of appeal through the internal ADF redress of grievance⁷⁵
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72 In practice including appointment holders detailed at Annex Committee to Draft Defence Instruction (Army) Personnel, *Administrative Censures* and Commanding Officers of the rank of Lieutenant Colonel.

73 Department of Defence, Submission, p. 1037.

74 While the specified life of the censure is not limited by the draft policy, the term of a censure is 'normally between two and five years ... [although]... a censure may be issued for a longer period, or for the entire length of the recipient officer's career.' (See Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 2).

75 When a members submits a Redress of Grievance in respect of proposed administrative action, the implementation of the proposed administrative action is suspended pending the outcome of the Redress of Grievance.

system,⁷⁶ or through external agencies, such as the Defence Force Ombudsman,⁷⁷ the Human Rights and Equal Opportunity Commission, and the civil courts.

- 5.37 The effect of a censure within Army on an officer's future employment and promotion can be significant. It will be considered in any decisions relating to the officer's career management and may indicate unsuitability for certain postings. With regard to promotion, the draft policy states that the 'issue of a censure will, except in cases of compelling Service need, make the recipient officer non competitive for promotion for the period that the censure remains active.'⁷⁸ Thus a censure can have a stagnating effect on an officer's career, precluding promotion and discounting him or her from consideration for certain postings.
- 5.38 The Committee accepted that current policy for administrative censure within Army provided individuals with significant avenues of appeal against the censure action.⁷⁹ However, given the potential impact of a censure on an officer's future employment and promotion the Committee did not accept that the dual roles of the initiating officer and the decision-maker performed by the commander provided adequate safeguards to protect individuals from misuse of the administrative censure process. In addition, the Committee noted that current policy is inadequate, only exists in draft form and does not require the individual affected by censure action to be advised of his or her rights of appeal.

Air Force

- 5.39 The policy for formal warning of members of Air Force is detailed in Defence Instruction (Air Force) Personnel 4-19. Formal Warnings⁸⁰ can take two forms: a Unit Formal Warning or, in more serious circumstances, an Air Force Office Warning.
- 5.40 The Unit Formal Warning is 'intended to be an aid to effective personnel management and [is] used when other attempts at corrective action have

76 Defence Instruction (General) Personnel 34-1.

77 Defence Instruction (General) Personnel 34-3.

78 Draft Defence Instruction (Army) Personnel, *Administrative Censures*, p. 3.

79 Through the internal ADF redress of grievance system, or through external agencies, such as the Defence Force Ombudsman, the Human Rights and Equal Opportunity Commission, and the civil courts.

80 Formal Warnings are quite distinct from Unsuitability Reports. The latter is used when a member of the Air Force, for reasons beyond their own control, is unable to perform satisfactorily the duties of the posting, rank, mustering or specialisation (Instruction (Air Force) Personnel 4-19, Annex B, p. B1).

failed or are deemed inappropriate.’⁸¹ Formal Warnings are employed when ‘a member fails to respond to advice and formal counselling by failing to improve their performance or behaviour...[or]...when the member has fallen short in the performance of their duties, because of misconduct or other reasons of a serious nature’.⁸² The decision to issue a Unit Formal Warning to a member is normally preceded by a period of formal counselling. A Unit Formal Warning can be issued to any member of the Air Force.

- 5.41 When raising a Unit Formal Warning on an officer, the Commanding Officer is required to provide initial advice of this intention to the Directorate of Personnel Officers – Air Force.⁸³ In preparing the Unit Formal Warning, the Commanding Officer is required to detail the alleged shortcomings of the individual, specify the proposed period for the warning and invite the affected member to make a statement in extenuation / rebuttal.
- 5.42 The member’s statement in extenuation / rebuttal is reviewed by the Commanding Officer in determining whether to proceed with the proposed Unit Formal Warning. If requested an officer is to be made available to assist an airman / airwoman with the preparation of the member’s statement.⁸⁴ Where the Commanding Officer decides to proceed with warning action he or she is required to comment on the statement and have that comment acknowledged by the affected member. Both the Commanding Officer and the affected member have access to legal advice during the Unit Formal Warning process.
- 5.43 The Unit Formal Warning is prepared in duplicate with one copy retained by the unit and the other forwarded to Air Force Office⁸⁵ through Wing Headquarters or the Support Unit. The Wing Headquarters or the Support Unit is required to comment on the warning before onforwarding to Air Force Office. If at the end of the Unit Formal Warning period a member has not reached the required standard, the Commanding Officer may raise an Adverse Report or extend the period of the Unit Formal Warning by raising an extension.⁸⁶ Such an extension requires that the affected

81 Defence Instruction (Air Force) Personnel 4-19, Annex G, p. G1.

82 *ibid.*

83 Defence Instruction (Air Force) Personnel 4-19, p. 3.

84 *ibid.*, p. 4.

85 To the Directorate of Personnel Officers – Air Force or the Directorate of Personnel Airmen – Air Force as determined by the rank of the affected member. In this regard the policy is somewhat outdated as, since the implementation of the Defence Reform Program, both career management organisations fall under the Defence Personnel Executive Program.

86 Defence Instruction (Air Force) Personnel 4-19, p. 4.

member is formally counselled, the specifics of how the member is failing to meet the required standard outlined and the member provided with an opportunity to make a written statement regarding the extension. If the member improves to the required standard within the period of the Unit Formal Warning, the Commanding Officer is to formally release the member from the warning. The distribution requirements for both an extension and a release are the same as for submission of the original Unit Formal Warning.

- 5.44 Air Force Office Warnings are ‘distinct from those issued by units in that they are deemed to be more serious than a Unit Formal Warning; however, there is no administrative difference between the [two forms of warning] as far as the member is concerned.’⁸⁷ Air Force Office Warnings are issued when the relevant career management organisation within Air Force Office determines that ‘an existing Unit Formal Warning requires greater emphasis, or a member’s record indicates that they should be formally warned but no Unit Formal Warning has been issued’.⁸⁸ The process for the issue of an Air Force Office Warning allows for the affected member to make a statement in extenuation / rebuttal and for that statement to be considered by the decision-maker in determining whether to proceed with the formal warning. Release from an Air Force Office Warning is initiated by Air Force Office after consultation with the member’s Commanding Officer.
- 5.45 Where a member fails to respond to a formal warning the Commanding Officer may raise an Adverse Report on the member. The Adverse Report details the circumstances leading to the decision to submit the report and the Commanding Officer’s recommendation for subsequent action. The member is provided with a copy of the report and given an opportunity to make a statement in extenuation / rebuttal. As for the formal warning process, the member is provided with access to legal advice throughout the process. The Adverse Report is submitted to Air Force Office through Wing Headquarters or the Support Unit. Unlike the formal warning process, the roles of the initiating officer and the decision-maker are quite separate, with the Commanding Officer initiating the process, but the decision on subsequent action being taken by the relevant career management organisation in Air Force Office. An Adverse Report can be used as the basis to pursue other forms of administrative action including termination, reduction in rank and re-mustering.

87 Defence Instruction (Air Force) Personnel 4-19, Annex H, p. H1.

88 *ibid.*

- 5.46 The effect of a formal warning within Air Force on a member's future employment and promotion can be significant. It will be considered when selecting the member for future postings and may indicate unsuitability for certain postings. When a member under warning is posted, details of the warning are passed to the gaining unit and responsibility to manage the warning is assumed by the new Commanding Officer. While a censure in itself will not preclude an officer from being considered for promotion it will be taken into account by the promotion authority with all the other attributes of the officer and will form part of the officer's overall efficiency profile. The effect of a formal warning is far more clear for airmen / airwomen who, in accordance with Defence Instruction (Air Force) Personnel 5-1, will not normally be promoted while under a formal warning.
- 5.47 The Committee's main concern with the formal warning process employed within Air Force is that it does not provide for any separation between the initiating officer and the decision-maker. Indeed the Commanding Officer functions in both roles for a Unit Formal Warning and Air Force Office perform both roles in an Air Force Office Warning. Given the potential impact of a formal warning on a member's future employment and promotion, the Committee did not accept that this arrangement provided adequate safeguards to protect individuals from misuse of the formal warning process. Notwithstanding, the Committee acknowledged that, as for other forms of administrative action, the individual is provided with significant avenues of appeal through the internal ADF redress of grievance⁸⁹ system,⁹⁰ or through external agencies, such as the Defence Force Ombudsman,⁹¹ the Human Rights and Equal Opportunity Commission, and the civil courts. In addition, the Committee noted that current policy does not require the individual affected by a formal warning to be advised of his or her rights of appeal.

Impartiality

- 5.48 The impartiality of the commander in the administrative censure process was called into question by several submissions.⁹² The principal theme revolved around the commander's conflict of interest in resolving to

89 When a members submits a Redress of Grievance in respect of proposed administrative action, the implementation of the proposed administrative action is suspended pending the outcome of the Redress of Grievance.

90 Defence Instruction (General) Personnel 34-1.

91 Defence Instruction (General) Personnel 34-3.

92 Lieutenant Colonel N James, Submission, p. 681.

pursue administrative action: issuing the *Notice to Show Cause*⁹³ and then, taking the decision whether to cease or effect administrative action. In resolving to pursue administrative action, the commander must have adjudged that the subordinate has an administrative case to answer. While the *Notice to Show Cause* provides advice on the type of censure action to be taken and the material upon which the commander will rely in reaching a decision, the onus is on the subordinate to demonstrate, to the commander, why the proposed action should not proceed. One submission suggested that this process serves to ‘reverse the onus of proof and force the recipient to demonstrate their innocence.’⁹⁴ The submission went on to propose that a ‘service member in receipt of a *Notice to Show Cause* should be able to request (from an independent higher authority) disqualification of the issuing officer where there is a conflict of interest.’⁹⁵

- 5.49 The Committee noted that unlike the DFDA the administrative action system does not provide for an automatic review of decisions affecting members. Rather the administrative action is dealt with as a formal but private matter between the commander and the subordinate. While the subordinate has access to legal advice during the process and has extensive rights of appeal following the decision to effect administrative action, there is no safeguard of impartiality external to the core functions provided by the initiating officer and the decision-maker.
- 5.50 The Committee agreed that in forms of administrative action where the roles of initiating officer and decision-maker are separated, sufficient safeguards existed to prevent misuse of the administrative action process. However, where the commander is required to perform the dual roles of initiating officer and decision-maker there is potential for the outcome to be influenced by a conflict of interest. This is the situation that exists within the Commanding Officer’s censure of Navy, the administrative censure process of Army and the Formal Warning procedure within Air Force. Given the significant impact that censure action can have on a member’s future employment and promotion, the Committee did not accept the argument that such administrative action is a command decision that stands outside the requirement for impartiality.
- 5.51 The Committee accepted that the issue of impartiality could be addressed by the introduction of a system for automatic review of decisions to effect administrative action. Automatic review would not affect the ability of a commander to decide to effect administrative action but would provide a

93 Or the Notice of Cause (Navy) or Formal Warning advice (Air Force).

94 Lieutenant Colonel N James, Transcript, p. 99.

95 Lieutenant Colonel N James, Submission, p. 682.

guarantee of the impartiality of the decision making process. However, the Committee was of the view that a more simple approach would be to ensure that all forms of administrative action incorporated a separation between the roles of initiating officer and decision-maker. Such an approach would require the ADF to revise the framework for administrative censure and formal warning.

Conclusions

- 5.52 The Committee accepted that administrative censure provides a valid means for the ADF to deal with matters for which DFDA action is either not applicable or not appropriate. However, notwithstanding the different requirements of the individual Services, the Committee was of the view that policy for censure or formal warning of members is inconsistent across the three Services. The Committee found that policy is, in some areas, unclear and in other areas lacking detail. Indeed, Army policy on administrative censure exists only in draft form and is clearly inadequate. The Committee noted the significant impact that censure action can have on a member's future employment and promotion and concluded that current policy did not provide adequate guidance for the imposition of administrative censure within the ADF. In addition, the Committee was of the view that where a member affected by administrative censure makes a statement in extenuation / rebuttal,⁹⁶ that statement should form part of the censure document and be taken into account during deliberations when the censure is considered.⁹⁷ The Committee also noted that current policy does not require the individual affected by a censure or formal warning to be advised of his or her rights of appeal.
- 5.53 At the conceptual level, the Committee was not able to determine why administrative censure is only applicable to officers in Navy and Army but formal warning is applicable to all members of the Air Force. Having accepted the validity of administrative censure as an avenue to deal with certain matters, the Committee was of the view that censure action should be applicable to all members of the ADF.

96 When asked to show cause why such action should not proceed.

97 When the censure is placed on a member's personnel file a copy of the statement in extenuation / rebuttal would accompany the source document.

Recommendation 56

The Committee recommends that the ADF consider the implementation of a revised framework for administrative censure and formal warning that:

- a) makes the process applicable to all members of the ADF; and**
- b) incorporates a separation between the roles of initiating officer and decision-maker.**

Recommendation 57

The Committee recommends that the ADF prepare and issue revised policy for the imposition of administrative censure and formal warning.

Recommendation 58

The Committee recommends that where a member affected by administrative censure makes a statement in extenuation/rebuttal, that statement should form part of the censure document and be taken into account during deliberations when the censure is considered.

Recommendation 59

The Committee recommends that the ADF incorporate specific guidance in the revised policy covering administrative censure and formal warning which requires that an individual affected by a censure or formal warning to be advised of his or her rights of appeal.

Procedural Fairness

- 5.54 No issues of procedural fairness in regard to administrative action were raised in the evidence. Nonetheless, the Committee considered the administrative action process in regard to issues of procedural fairness and accepted that:

- the right to be informed and to have an opportunity to respond (and have any information submitted by them considered by the decision-maker) are satisfied by the *Notice to Show Cause* process;
- the administrative action process allows for access by the subordinate to any evidence relied upon in making a decision; timely advice regarding the decision to cease or effect administrative action; and advice regarding right of review;
- the current method of handling administrative action as a private matter between the commander and the subordinate, coupled with existing practices for handling confidential documents, satisfy the rights of members to expect that any information relating to them will be treated discreetly and their privacy respected;
- the process of administrative action provides that actions taken are based on logically probative evidence and that members are provided reasons for any decisions made or actions taken.

5.55 The Committee accepted that the issues of procedural fairness are provided for and the rights of individuals are adequately protected in the administrative action process.

Appeal

5.56 Should the commander decide, following consideration of the reply to the *Notice to Show Cause*, to effect administrative action, the subordinate has rights of appeal through the internal ADF redress of grievance system. Further rights of appeal are provided through external agencies, such as the Defence Force Ombudsman, the Human Rights and Equal Opportunity Commission, and the civil courts.⁹⁸ No issues regarding rights of appeal against administrative action were raised in the evidence and the Committee was of the view that the process of administrative action incorporates adequate provisions, both internal and external to the ADF for members to appeal an action or decision.

98 Department of Defence, Submission, p. 1037.

Training

- 5.57 Administrative action may be initiated or applied by officers in command of a unit or independent sub-unit. Most types of administrative action and certainly the most serious types, can only be recommended at Commanding Officer level with the final decision taken by a superior officer or at Service Headquarters level.⁹⁹ The ADF advised the Committee that training for officers charged with the responsibility for applying administrative action is provided:
- on initial entry level for officers;
 - on specialist training courses for officers of some specialisations;¹⁰⁰ and
 - on courses conducted for commanding officers elect.¹⁰¹
- 5.58 In addition, officers charged with the responsibility for applying administrative action, either as initiating officers or as decision-makers have access to specialist advice including:
- Service legal officers attached to units and headquarters;
 - officers whose specialisation has involved detailed training on personnel management policy and procedures;
 - legal officers in the Defence Legal Office; and
 - staff at the Defence Complaints Resolution Agency.¹⁰²
- 5.59 The Committee acknowledged that the application of administrative action should be well within the professional competence of ADF officers. The Committee accepted that initial training at entry level for officers coupled with specific training for commanding officers elect and supported by clear practical policy and procedural guidance should be sufficient to ensure the effective application of administrative action within the ADF. In addition, access to specialist advice should provide for circumstances that fall outside standard procedural guidance.

99 *ibid*, p. 1226.

100 Specialisations that involve detailed training on personnel management policy and procedures.

101 Department of Defence, Submission, p. 1215.

102 *ibid*.

Legal Representation

- 5.60 Legal advice is available to any member of the ADF subject to administrative action. Such advice is provided by a Permanent Forces or the Reserve Forces legal officer¹⁰³ at no cost to the member. Where a member chooses to seek advice from a civilian legal practitioner, that advice will be at the member's expense. Service legal assistance is also available to assist members in preparing an application for a Redress of Grievance.¹⁰⁴
- 5.61 The Committee noted that the only limiting factor in the provision of legal representation is the availability of Permanent Force legal officers¹⁰⁵ and for this reason Reserve legal officers are often made available to a member who is subject to administrative action. No issues regarding the provision of legal advice to members subject to administrative action were raised in the evidence and the Committee was satisfied that suitable provisions exist for members to access legal advice in such circumstances.

Cost

- 5.62 The Committee acknowledged that there is no historical cost for administrative action within the ADF. In addition, the Committee noted that administrative action process is conducted primarily by members of the ADF who perform administrative action functions as a secondary duty that is incidental and additional to their normal duties.¹⁰⁶ While many of the functions performed in the administrative action process involve no direct cash expenditure there is a cost in accrual terms. However, the Committee noted that the ADF does not currently capture accrual costings of such functions. Earlier in this report¹⁰⁷ the Committee has recommended that the ADF examine the feasibility of capturing the cost of the military justice system.

103 A person who is enrolled as a barrister, a solicitor, a barrister and solicitor or a legal practitioner of a civil court (See DFDA, Section 3).

104 The role of the legal officer is not to take on the running of the complaint, but to provide advice on rights and principles of administrative law and procedural fairness. (See Smith, P., *op cit*, p. 64).

105 A Permanent Force legal officer may be unavailable because he or she has the responsibility to provide advice to the command structure and representation of the accused would bring into question issues of conflict of interest (See Ms P Smith, *op cit*, p. 63).

106 Department of Defence, Submission, p. 1290.

107 See Recommendation 44 of this report.

Reporting

- 5.63 The Committee noted that there is no statutory or policy requirement for the ADF to provide an annual report on the operation of the administrative action system. Further the Committee noted that, in practice, the ADF does not maintain statistics of administrative action taken and provides no formal report on this issue.
- 5.64 The Committee concluded that the ADF should publicly account for the operation of the administrative action system by the provision of an annual report to the Minister of Defence. Without attempting to be prescriptive, the Committee was of the view that the report should include statistical information and an outline of the operation of the administrative action system. Like the annual report by the JAG, the report on the administrative action system should be laid before each House of the Parliament by the Minister of Defence. Once tabled in the Parliament the report would become public information.
- 5.65 The Committee also concluded that the ADF should publicly account for the operation of the military inquiry system by the provision of an annual report to the Minister of Defence. This conclusion is covered in detail at paragraph 3.164 of this report. As outlined earlier in this report,¹⁰⁸ the Committee was of the view that it would be sensible to combine the reporting requirements for military inquiries, the DFDA and administrative action in a single report to the Minister of Defence.

Senator D J MacGibbon
Chairman

108 See Recommendation 45 of this report.

